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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. PETER WILLIAM RUZZO, Defendant and Appellant.	E035867 (Super.Ct.No. SWF004468) OPINION

APPEAL from the Superior Court of Riverside County. Michael S. Hider, Judge. (Retired Judge of the Merced Sup. Ct. assigned by the Chief Justice pursuant to art VI, § 6 of the Cal. Const.) Affirmed.

Michelle C. Rogers, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, and Daniel Rogers, Deputy Attorney General, for Plaintiff and Respondent.

Following the denial of the suppression motion (Pen. Code,[1] § 1538.5) of defendant Peter William Ruzzo, he pled guilty to six counts of lewd and lascivious acts on a child under 16 (§ 288, subd. (c)(1)) and one count of penetration of a person under 18 with a foreign object (§ 289, subd. (h)). The trial court sentenced him to prison for three years. He appeals, unsuccessfully challenging the denial of his motion.

FACTUAL AND PROCEDURAL BACKGROUND

On May 23, 2003, Murrieta Police Officer Haughey contacted defendant's wife at her parents' Menifee home at 11:18 p.m. After speaking with her, the officer spoke with Jane Doe, a foreign exchange student, and determined defendant had sexually assaulted Jane Doe. Both defendant's wife and victim accompanied the officer to the Murrieta police station where a follow-up investigation was conducted. Defendant's wife told the officer that defendant "was very distraught about the incident and that he had displayed suicidal behavior in the past and was under psychiatric care and taking medication which was Effexor," an antidepressant. The officer asked defendant's wife to call him at home. When she was unable to contact him, she said she "was very concerned about his well-being because he did not answer. She knew he should be home." She was afraid he may have hurt himself. She gave the officer her key to the family residence so he could enter the home to check on defendant's condition.

Officer Haughey went to the family home where he saw defendant's vehicle parked in the driveway Based on that fact and the statements of defendant's wife that he had not answered her phone call and that he may hurt himself, the officer forcefully knocked "numerous times" and loudly announced he was from the Murrieta Police Department. After unlocking the door with the key provided by defendant's wife, Officer Haughey announced he was from the Murrieta Police Department and asked defendant to come down. After the officer repeated the announcement several times, defendant said

[1] All further statutory references are to the Penal Code unless otherwise noted.

he was coming and appeared at the front door. The officer asked defendant to step outside and arrested him after he complied. At defendant's request, the officer retrieved defendant's cellular phone from the master bedroom and his Effexor medication from the kitchen. Until then, the officer had not entered the residence.

Officer Haughey, whose expertise is undisputed, testified in the past it had taken "a few hours," approximately two to three hours, to obtain a search warrant telephonically.

Defendant's wife also testified at the suppression hearing. She saw the police at approximately 11:30 p.m. on May 23, 2003, at her parents' home. She had gone to her parents' home that evening because she was very angry at defendant after he told her "what had happened between him and the exchange student that was staying with [them]." She told the officer she "was very concerned" for defendant because "he had talked to a suicide hot line earlier that evening." Her father was present when she told the officer of her concerns. She accompanied the officer to the station where she called defendant at the officer's request. When defendant did not answer the phone, she told the officer of her concerns. She said defendant should be home and she described his vehicle. She also said he was distraught over the molestation, was taking antidepressant medication and might have hurt himself.

Defendant's wife was very angry when she left the family residence. She took a suitcase, her dog and as much as she could to her parents' home. She considered taking her cats, but "ultimately decided against that." She was contemplating divorce. She did not want to go back and thought she would send her parents to get more of her belongings. She did not consider herself a resident of that home any longer. She told the officer she was very angry and was separating. But she did not tell the officer she had no intention of going back because at that time she did not know. She "mentioned again that [she] was concerned for [defendant's] well-being, that [she] thought he was possibly suicidal." She gave the officer her key to her "home" and he left around three in the

morning. At the time it would have been more accurate to say her "former home." She was still very angry with defendant, but she was concerned about him and wanted the officer to check on him because she still loved him. At the time of the suppression hearing, she was living with defendant in their home. A third party contacted "the police to report an incident that had happened between him and the student that was staying in the home."

Denying defendant's suppression motion, the court stated: "The Court does not find the officer's conduct to be unreasonable and it does appear to the Court that a reasonable officer would have believed that they had valid consent to search this home based on the facts known to the officer at the time. [¶] The Court also believes that the caretaker exception would apply. The exigency manifested itself most strongly after the phone call was made and no answer was received and so I don't believe that the fact that there was some information hours earlier that the defendant was either depressed or suicidal militates against a finding of exigent circumstances. So for both of those reasons, the Court will deny the defendant's motion to suppress."

DISCUSSION

On appeal, defendant contends his Fourth Amendment right to be free from unreasonable searches and seizures was violated when the officer entered his residence without a warrant. The contention lacks merit because the record supports the trial court's findings that the entry was authorized by defendant's wife's consent and the caretaker exception to the Fourth Amendment's prohibition against warrantless searches and seizures.

In reviewing the denial of a suppression motion, we defer to the trial court's factual findings where supported by substantial evidence, but exercise independent judgment to determine whether, on the facts found, the search was reasonable under Fourth Amendment standards. (*People v. Leyba* (1981) 29 Cal.3d 591, 596-597,

superseded by statute on another ground as stated in *People v. Trujillo* (1990) 217 Cal.App.3d 1219; *Ornelas v. United States* (1996) 517 U.S. 690.)

2. The entry was authorized by defendant's wife's consent.

Free and voluntary consent to search is a well-established exception to the Fourth Amendment's warrant requirement. (*People v. James* (1977) 19 Cal.3d 99, 106.) The validity of consent is "'a question of fact to be determined in light of all the circumstances.' [Citations.]" (*Ibid.*) Valid consent may be obtained from the owner or tenant of property or from a third party who possesses common authority over the property. (*In re Scott K.* (1979) 24 Cal.3d 395, 404.) When police officers reasonably and in good faith believe that a third party has authority to consent to a search, the consent is lawful even if that party does not have actual authority. (*Illinois v. Rodriquez* (1990) 497 U.S. 177, 179, 188-189 [110 S.Ct. 2793, 111 L.Ed.2d 148].) Consent by a third-party cotenant with common authority is sufficient to justify a search, even though another tenant or the defendant refuses to consent. (*United States v. Matlock* (1974) 415 U.S. 164, 171 [94 S.Ct. 988, 39 L.Ed.2d 242]; *People v. Haskett* (1982) 30 Cal.3d 841, 856.) "The authority which justifies the third-party consent does not rest upon the law of property, with its attendant historical and legal refinements . . . but rests rather on mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched." (*United States v. Matlock, supra,* 415 U.S. at p. 171, fn. 7.)

In the case of a cotenant spouse, the court in *People v. Bishop* (1996) 44 Cal.App.4th 220, found consent effective from a wife who had moved to a battered woman's shelter three weeks before giving her consent to a search of the house she had shared with her defendant spouse. (*Id.* at pp. 237-238.) In doing so, the court in *Bishop* reviewed various federal and other state cases which had found an absentee spouse had

authority to consent to the search of a house where that spouse had a continuing property interest in the premises but had been effectively forced out by the defendant. (*Id.* at pp. 237-238.) Based on that legal authority, the court in *Bishop* found the facts that the wife still had the right to live in the house, had a substantial amount of property in the house, and had moved to the shelter out of fear for her safety after her husband had been physically abusive toward her showed the wife had "continuing authority in her own right to consent to a search of the house. [Citations.]" (*Id*. at p. 239.)

Here, defendant's wife lived in the home with him. She was temporarily at her parents' home where she had gone in anger the evening before the early morning challenged entry after defendant admitted sexually molesting the foreign exchange student who resided with them. She took the victim, a suitcase and her dog, but left behind the majority of her belongings and her cats. While she told the police she was very angry at her husband and was contemplating divorce, she also indicated she was concerned because he was distraught and showed suicidal behavior. When she could not reach him by phone, she became very concerned and gave the officer her key to her home to check on him.

Defendant argues the officer should have inquired into the validity of her consent because she voluntarily left the home and did not intend to return. However, she testified she did not express that intent to the officer. Rather, she demonstrated her concern for defendant's well-being when she provided the officer with her key to her home. Furthermore, she moved back to her home before the suppression hearing, still lives there and still is married to defendant.

Citing *People v. Bishop, supra,* 44 Cal.App.4th 220, defendant argues a spouse who is absent from the home can provide consent only if she was involuntarily excluded from the home. However, involuntary exclusion was only one of the factors considered by the court in *Bishop.* (*Id.* at p. 239.) The *Bishop* court also considered that they were still married and Bishop had no right to exclude her, she remained liable for the rent or

for the accidents occurring on the property despite her absence, and a substantial amount of her and her children's property remained in the house. (*Ibid.*)

Thus, like the absentee wife in *Bishop*, defendant's wife continued to possess continuing authority in her own right over the property. (*People v. Bishop, supra,* 44 Cal.App.4th at p. 239.) She left the family residence the evening before the challenged early morning entry and was absent for only a few hours, defendant had no right to exclude her, they were still married, she remained liable for the rent/mortgage payments or accidents occurring at the residence and a substantial amount of her property, as well as her cats, remained at the residence. Therefore, the trial court's conclusion that the consent given by defendant's wife was valid was clearly right.

3. The entry was authorized by the community caretaker exception.

Citing *People v. Ray* (1999) 21 Cal.4th 464, defendant argues the entry cannot be justified under the community caretaker exception.

In *Ray,* the Supreme Court noted that the police are expected to perform community caretaker functions which are wholly unrelated to criminal investigations. (*People v. Ray, supra,* 21 Cal.4th 464, 471-472.) Frequently, friends, relatives and others contact the police and ask them to check on the health, safety and welfare of loved ones. (*Id.* at p. 472.) The *Ray* court acknowledged it had long recognized such principles and "'[n]ecessity often justifies an action which would otherwise constitute a trespass, as where the act is prompted by the motive of preserving life or property and reasonably appears to the actor to be necessary for that purpose. [Citations.]'" (*Id.* at p. 473, quoting *People v. Roberts* (1956) 47 Cal.2d 374, 377.) The exception applies in circumstances short of a perceived emergency where the police reasonably believe entry is necessary. (*Ray,* at p. 473.)

"The appropriate standard under the community caretaking exception is one of reasonableness: Given the known facts, would a prudent and reasonable officer have perceived a need to act in the proper discharge of his or her community caretaking

functions? Which is not to say that every open door—even in an urban environment—will justify a warrantless entry to conduct further inquiry. Rather, as in other contexts, 'in determining whether the officer acted reasonably, due weight must be given not to his unparticularized suspicions or "hunches," but to the reasonable inferences which he is entitled to draw from the facts in the light of his experience; in other words, he must be able to point to specific and articulable facts from which he concluded that his action was necessary.' [Citation.]" (*People v. Ray, supra,* 21 Cal.4th at pp. 476-477.)

As set out above, the trial court found the officer acted reasonably. We agree. The facts known to the officer warranted further inquiry to resolve the possibility that defendant required assistance.

The officer knew that defendant and his wife had an argument about his conduct with the foreign exchange student they were hosting in their home. Defendant's wife left the home with the victim. She told the officer that defendant was distraught over the incident, possibly suicidal and was on antidepressant medication. He had called a suicide hotline earlier in the evening. He did not answer the phone when she tried to call him and she was worried he may have hurt himself. When the officer arrived at the residence, defendant's car was parked in the driveway, but he did not answer the door when the officer knocked forcefully and loudly announced he was from the police department. Unable to see inside, the officer used the key provided by defendant's wife to open the door. The officer remained outside and did not enter while he called loudly for defendant to come down. Defendant finally responded and was arrested when he stepped out of the residence at the officer's request. These facts support the trial court's conclusion that the officer acted reasonably and within the scope of the community caretaker exception.

Defendant's argument that the exception is inapplicable because the officer had "mixed motives" or completely investigatory motives is not supported by the record. The testimony of both the officer and defendant's wife established that she gave the key to the officer because she was concerned about his well-being since he was distraught, on

antidepressant medication and had called a suicide hotline earlier in the evening. Weighing their testimony and judging their credibility, the trial court impliedly found the officer acted consistently with caretaking motives and duties. On the record before us, we agree and conclude the trial court properly applied the community caretaker exception.

DISPOSITION

The judgment is affirmed.

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HOLLENHORST
Acting P. J.

We concur:

McKINSTER
J.

WARD
J.